

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the Operations and Practices of
Qwest Communications Corporation, et al.
Concerning Compliance with Statutes,
Commission Decisions, and Other Requirements
Applicable to the Utility's Installation of Facilities
in California for Providing Telecommunications
Service.

Investigation 00-03-001
(Filed March 2, 2000)

**ADMINISTRATIVE LAW JUDGE'S RULING DENYING MOTION TO QUASH
SUBPOENAS AND GRANTING PROTECTIVE ORDER IN CONNECTION
WITH ARCHAEOLOGISTS' DEPOSITIONS**

This ruling is issued to memorialize telephonic rulings made in connection with a motion filed on February 4, 2005, by the Consumer Protection and Safety Division (CPSD) to quash a series of seven deposition subpoenas served by respondent Qwest Communications Corporation (Qwest).¹ Three of the subpoenas were served on archaeologists associated with the Archaeological Research Center (ARC), which prepared a report for CPSD on the possible impacts of Qwest's construction activities on archaeological sites in Santa Clara and San Luis Obispo Counties. These three archaeologists are Dr. Mark Basgall,

¹ Motion of the Consumer Protection and Safety Division to Stay Depositions and to Quash Subpoenas for Deposition, Or, in the Alternative, to Allow Limited Depositions (CPSD Motion to Quash).

Leslie C. Glover and David W. Glover. The ARC report was made available to Qwest and the undersigned in November 2004.

The other four deposition subpoenas were served on archaeologists not associated with ARC who conducted a “peer review” of a report prepared by Qwest’s archaeological consultant, Cynthia Arrington, which dealt with the same general subject matter as the ARC report. Ms. Arrington’s report was included as an appendix to the ARC report, as were four letters from the peer reviewers concerning the Arrington report. The four peer reviewers are William R. Hildebrandt, Ph.D., Dana McGowan, Wendy J. Nelson, Ph.D., RPA, and Julia G. Costello, Ph.D.

In its motion, CPSD argued that despite the provisions of Pub. Util. Code § 1794 allowing depositions in Commission proceedings,² the depositions of CPSD’s archaeological consultants should not be allowed because of Qwest’s failure to utilize less intrusive means of discovery. CPSD’s motion states:

“CPSD is not contesting Qwest’s right to make reasonable and appropriate discovery requests. However, that is not the case. The seven depositions proposed by Qwest are excessive, duplicative, and unnecessary. The ARC Report has already been available to Qwest since November, thus affording Qwest ample time to conduct

² Pub. Util. Code § 1794 provides in full:

“The commission or any commissioner or any party may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within or outside the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, and accounts.”

discovery through more traditional methods such as data requests. The report itself serves as a comprehensive statement of ARC's methodology, analysis and conclusions. Any additional information that could be elicited from depositions is not likely to be of grave importance, or it would have already been included in the report. If Qwest is seeking to depose the ARC affiliates simply to discredit the report, it will have an opportunity to do so on the witness stand at the hearing. Thus, there is no justification for [taking the seven requested depositions.]” (CPSD Motion to Quash, p. 5.)

CPSD particularly objected to the deposition subpoenas served on the peer reviewers, since “the opinions offered by the peer reviewers are brief . . . and go only to the adequacy of the methodology, and support for the conclusions. The peer reviewers do not express any opinion with respect to the main issue of whether any cultural resources impacts were likely to have occurred as a result of Qwest's construction, or whether CEQA laws and regulations were followed.” (*Id.* at 6.) Thus, CPSD's motion continued, it was unlikely that depositions would reveal any information beyond that contained in the peer reviewers' letters.

As an alternative to quashing all seven of the subpoenas, CPSD requested that the number of depositions be limited, and that they be arranged so as to accommodate the archaeologists' work schedules.

Pursuant to my February 7, 2005 e-mail ruling shortening the time for response, Qwest submitted its response to CPSD's motion to quash on February 10, 2005. In its response, Qwest argued:

“[U]nder Commission precedent, Qwest is entitled to take depositions unless CPSD affirmatively shows that ‘the burden, expense or intrusiveness of the depositions sought outweighs the likelihood that the information obtained will lead to admissible evidence.’ No such showing has been made here.” (Qwest Response, pp. 4-5; emphasis in original, footnote omitted.)

Qwest continued that in view of the unfavorable contents of the ARC report (which Qwest's papers referred to as the "Adequacy Assessment") and the four peer reviewers' letters, its right to pursue discovery through depositions could not reasonably be questioned in this case:

"In the instant Commission enforcement proceeding, discovery is necessary for Qwest to defend itself and cross-examine those individuals who are responsible for the Adequacy Assessment and the highly critical peer reviews. The Adequacy Assessment alleges that Qwest's fiber optic installation in California may have harmed certain cultural resources and attacks the credibility of the [Arrington report.] The depositions will be narrowly focused and will allow the parties to test the merits of the case. Given that Qwest is potentially liable for large monetary penalties, there is a compelling reason to allow Qwest the necessary discovery rights to allow it to pursue its defense in this case. Furthermore, the depositions will assist the parties in determining whether settlement is possible." (*Id.* at 5.)

The Telephonic Rulings Limiting the Duration of the Depositions and Requiring that the Witnesses Be Paid Their Customary Fees

As the language of Pub. Util. Code § 1794 indicates, the Commission looks to the relevant provisions of the California Code of Civil Procedure (CCP) for guidance in matters of deposition practice. Consistent with the broad powers conferred on trial judges by the CCP to control depositions, this Commission has held that the power of ALJs to control the taking of depositions in proceedings assigned to them is virtually plenary.³

³ See, e.g., Rulemaking 01-09-001, "Administrative Law Judge's Ruling Regarding Pacific Bell's Motion to Confirm Its Right to Conduct Depositions," issued May 14, 2002, *mimeo.* at 3 (discussing the power to limit depositions conferred by CCP §§ 2017(c), 2019(b)(1), 2025(i)).

In keeping with these broad powers, I informed counsel for CPSD and Qwest that a conference call would be held on February 11, 2005 to consider the issues raised by the motion to quash. In the conference call, I ruled that Qwest would be permitted to take the depositions of the three archaeologists involved in the preparation of the ARC report, Dr. Mark Basgall, Leslie Glover and David Glover. After some discussion of whether the opinions expressed in the peer reviewers' letters were cumulative, I also ruled that Qwest should be permitted to take the depositions of the four peer reviewers, William Hildebrandt, Dana McGowan, Wendy Nelson and Julia Costello. However, I also ruled that (1) Qwest would be required to pay the cost of providing transcripts of all of the depositions to CPSD, and (2) I would retain jurisdiction over the matter until all of the necessary deposition arrangements had been worked out.

After further discussion of the issues raised by the proposed depositions, I also ruled that (1) all of the witnesses' depositions would have to be completed on the same day they were commenced, so as to avoid disrupting the witnesses' work schedules any more than necessary, (2) Qwest would be required to accommodate the seven witnesses' work commitments in scheduling the depositions, and (3) Qwest would be required to compensate the witnesses for the time they actually spent being deposed, in addition to reimbursing them for the costs of traveling to the deposition site.⁴ Finally, I stated that another conference call would be held early in the week of February 14 to discuss the

⁴ In its February 10, 2005 response, Qwest had stated that upon request, it would pay for the witnesses' travel costs to the deposition site in Sacramento. (Qwest Response at 8.)

witnesses' schedules and the arrangements that Qwest and CPSD had made to implement my rulings.

The next conference call was held on February 15, 2005. In the meantime, counsel for CPSD had contacted the three ARC witnesses (and through them, the peer reviewers) to determine whether all of these witnesses could be available for deposition on Qwest's preferred dates, February 22 and 23. Counsel for CPSD had also provided Qwest's counsel with a statement of the customary hourly fees of all of the proposed deponents except William Hildebrandt.⁵ For its part, Qwest agreed to narrow significantly the scope of the document requests accompanying the deposition subpoenas served on the peer reviewers.

During the February 15 conference call, counsel for CPSD and Qwest both provided me with e-mail messages setting forth the agreement they had reached on the dates for and durations of the depositions. However, counsel for Qwest stated that she was not authorized to pay any of the witnesses more than \$40 per hour for their actual deposition time, an amount well below the customary hourly fees for all except one of the witnesses. In response, I ruled that (1) the customary hourly fees reported by CPSD were reasonable, (2) the situation here was analogous to that provided for in CCP § 2034(i)(2),⁶ and (3) in accordance

⁵ Dr. Hildebrandt's customary hourly fee was subsequently provided by CPSD to Qwest's counsel.

⁶ CCP § 2034(i)(2) provides in pertinent part:

"A party desiring to depose any expert witness, other than a party of employee of a party, who is . . . an expert described in paragraph (2) of subdivision (a) except one who is a party or an employee of a party . . . shall pay the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed in the deposition

Footnote continued on next page

with the provisions of CCP § 2034(i)(2), Qwest would not be permitted to take the depositions unless and until it agreed to pay the seven witnesses their customary hourly fees. Qwest's counsel agreed to discuss the matter further with her client, and a conference call was scheduled for February 16, 2005 to have a final discussion of deposition arrangements.

Prior to the conference call on February 16, counsel for CPSD and Qwest both forwarded an e-mail message setting forth the deposition schedule they had agreed upon, as well as Qwest's agreement to pay the customary hourly fees of the seven witnesses for their time spent in deposition. I approved this schedule, with the understanding that Qwest would have three-quarters of the allotted time to ask its questions, and CPSD one-quarter of the time (unless it chose to cede some of this time to Qwest):

DATE	WITNESS	TIME
February 22, 2005	Dr. Mark Basgall	9:00 to 11:30 a.m.
	Leslie Glover	12:30 to 3:00 p.m.
	Dana McGowan	3:30 to 5:00 p.m.
February 23, 2005	Julia Costello	9:00 to 10:30 a.m.
	William Hildebrandt	11:00 a.m. to 12:30 p.m.
	Wendy Nelson	2:00 to 3:30 p.m.

subpoena . . . until the time the expert witness is dismissed from the deposition . . .”

The depositions were held on February 22 and 23, 2005 in accordance with the schedule set forth above, and the witnesses were paid the travel expenses and fees described in this ruling.

In accordance with the discussion set forth above, **IT IS RULED** *nunc pro tunc* that:

1. The motion of the Consumer Protection and Safety Division (CPSD) to quash the seven deposition subpoenas that Qwest Communications Corporation (Qwest) caused to be served on or about February 3 and 7, 2005, upon William R. Hildebrandt, Dana McGowan, Wendy J. Nelson, and Julia G. Costello, and upon Charlyn A. Hook, Esq. as agent for Mark Basgall, Leslie C. Glover, and David W. Glover, is denied.
2. CPSD's motion in the alternative to place reasonable limitations upon the taking of the depositions of the aforesaid individuals is granted.
3. The depositions shall be taken at the designated site in Sacramento, California, on the dates and for the periods of time specified in this ruling.
4. The witnesses shall be paid the travel expenses and customary hourly fees provided for in this ruling.

Dated March 4, 2005, at San Francisco, California.

/s/ A. KIRK McKENZIE

A. Kirk McKenzie
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion To Quash Subpoenas And Granting Protective Order In Connection With Archaeologists' Depositions on all parties of record in this proceeding or their attorneys of record.

Dated March 4, 2005, at San Francisco, California.

/s/ KRIS KELLER

Kris Keller

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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